Supreme Court, U.S.
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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Michigan imposes an annual tax on motor carriers of $100 per vehicle for the privilege of transporting property between points within the State. Though accepting that it "may be" that interstate motor carriers wishing to make such intrastate hauls "invariably will pay a higher per mile fee than the carrier who operates solely intrastate," the Michigan Court of Appeals upheld the tax over petitioners' Commerce Clause challenge. Deepening a split among state courts of last resort, the Michigan Court of Appeals reasoned that (i) this Court's "fair apportionment" requirement does not apply to taxes that are used to fund regulatory activities and (ii) petitioners could not rely on the discriminatory structure of the tax and instead were required to adduce evidence that particular trucking companies' "route choices are affected by imposition of the fee." Against this background, the question presented is:

Whether an unapportioned flat tax like Michigan's can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

RULES 14.1 AND 29.6 STATEMENT

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab., Inc., Deeco Services, Inc. d/b/a Deeco Transportation, Tiberio Frank d/b/a Fairfield Towing, Elex, Inc. d/b/a/ Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc. d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc. d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

The parent company of petitioner USF Holland, Inc. is USF Corporation. No publicly held corporation owns more than 10% of the stock of USF Holland, Inc. Petitioner American Trucking Associations, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Trucking Associations, Inc. ("ATA") and USF Holland Motor Express, Inc. ("USF") respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. *infra*, 1a-32a) is reported at 662 N.W.2d 784. The opinions of the trial court (App., *infra*, 33a-60a) and the orders of the Michigan Supreme Court denying review (App., *infra*, 61a-63a) are unreported.

JURISDICTION

The order of the Michigan Supreme Court denying review of the judgment of the Michigan Court of Appeals was entered on December 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

STATEMENT

The decision below injects an illogical and dangerous loophole into the limitations imposed by the Commerce Clause upon state taxing authority. This Court has held that state taxes affecting interstate commerce must be fairly apportioned among taxing jurisdictions, thus ensuring that no State "take[s] more than its fair share of taxes from [an] interstate transaction." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The Court also has held that a state tax may not discriminate in its practical effect against participants in interstate commerce. Flat state taxes, the Court has concluded, run afoul of both of these principles.

In this case, however, the Michigan Court of Appeals upheld just such a flat tax, reasoning that (1) the apportionment requirement does *not* apply so long as the revenues collected under a given tax are used to pay the costs associated with state regulatory activity; and that (2) taxpayers may not rely on the inherently discriminatory structure of a tax, and instead are obliged to adduce evidence that the tax affects their operations in a discriminatory way. That decision plainly departs from this Court's holdings, permits the imposition of cumulative and discriminatory burdens on interstate commerce, contributes to a growing disarray in the lower courts, and sows considerable confusion in an already complex area of the law. Further review therefore is warranted.

1. Michigan imposes a flat tax of $100 per vehicle on motor carriers that transport property between points within the State ("the Michigan tax"). MCL § 478.2(1). The same tax must be paid both by vehicles that confine their operations to Michigan and by those that engage in a combination of interstate and intrastate operations.[1] The amount due does not

[1] A separate charge of $100 per vehicle is imposed on vehicles registered in Michigan that operate exclusively in interstate commerce. MCL § 478.2(2). In addition, the State requires trucks

vary according to miles traveled or number of trips taken in Michigan, and is not apportioned to reflect the portion of time that a truck devotes to traveling between states or intrastate in states other than Michigan. Proceeds from the fee are used primarily for the "administration" of Michigan's law relating to the operation of motor carriers. *Ibid.*; see App., *infra*, 22a.[2]

To illustrate the operation of the Michigan tax, consider the example of a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by "topping off" its interstate haul with cargo that is transported between two points within the State.[3] That truck is obligated to pay the full $100 Michigan tax. At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during

that are registered outside Michigan to pay a registration fee of $10. MCL § 478.7. The validity of these charges is not at issue here.

[2] Prior to 1995, Michigan had a comprehensive regulatory system governing the intrastate transportation of property by motor carriers. During that period, the proceeds from the Michigan tax were used to pay for administration of this system. See MCL § 475.2. As of January 1, 1995, Congress preempted most state economic regulation of intrastate trucking operations, including regulation of intrastate prices, routes, and services; states retained responsibility for regulation of highway safety. See Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 601(a)(1), 108 Stat. 1605, codified at 49 U.S.C.§ 14501(c). Michigan did not amend its motor carrier law to reflect this change (see App., *infra*, 23a n.11), although the State now takes the position that fees collected pursuant to the Michigan tax are devoted to non-preempted regulation of highway safety, financial fitness, and insurance requirements for motor carriers. See *id.* at 19a.

[3] This is a realistic example; interstate truckers often supplement their interstate deliveries by topping of those loads with intrastate shipments or by hauling intrastate loads while between interstate movements. See App., *infra*, 31a.

the course of the year, will pay the same $100 tax. The only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

2. Petitioners ATA and USF brought this challenge in Michigan state court to contest the constitutionality of the Michigan tax under the Commerce Clause.[4] Petitioners relied on the familiar four-part Commerce Clause test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which establishes that a state tax will be deemed unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). Petitioners maintained that the Michigan tax failed the apportionment and anti-discrimination elements of the *Complete Auto Transit* test, contending that the invalidity of the tax was established by the Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), which struck down a flat state tax imposed on trucks traveling interstate.

The trial court rejected the challenge, upholding the Michigan tax. App., *infra*, 33a-45a. The court declared itself "not persuaded that the choice of whether to engage primarily

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[4] The current petitioners intervened to advance their Commerce Clause claim in a suit initiated as a class action by other plaintiffs that challenged other Michigan trucking fees on federal preemption and state-law grounds, and that also contested the Michigan tax on preemption grounds. See App., *infra*, 3a. The courts below denied all of the claims and upheld all of the challenged levies. See *id.* at 5a-32a. Only the Commerce Clause challenge to the Michigan tax is at issue in this petition. Our understanding is that the preemption aspect of the decision below will be challenged by other petitioners in a petition to be captioned *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Commission*.

in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns." *Id.* at 43a. Moreover, because the court believed that "the fee itself is not a tax on the privilege of doing business in Michigan," it concluded that "Commerce Clause interests are not affected by the intrastate vehicle fee." *Id.* at 44a. The court added that the "interest furthered by [the] fee" – that of ensuring "that vehicles and carriers operating on Michigan highways in intrastate service comply with [state] safety and fitness norms" – does "not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause." *Ibid.* Similarly, the court reasoned that, because interstate and intrastate carriers are not competing for interstate business, the Michigan tax "does not implicate Commerce Clause concerns." *Id.* at 45a. See *id.* at 46a-60a (denying rehearing).

The Michigan Court of Appeals affirmed, although on a different ground. App., *infra*, 1a-32a. The court began by repudiating the trial court's rationale, explaining that "any tax or regulation which effects [*sic*] interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. * * * Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 28a-29a.

Having said that, however, the court proceeded to uphold the Michigan tax. In doing so, the court relied upon an earlier aspect of its decision in which it determined, as a matter of state law, that the Michigan tax should be characterized as a "fee" rather than a "tax" because (1) most of its proceeds are used to enforce the regulatory provisions of Michigan's motor carrier law and (2) the aggregate fee revenues collected "are proportional to the cost of the services to which they relate."

App., *infra*, 22a-26a.[5] From that starting point, the court held that the *Complete Auto Transit* test is wholly inapplicable to the Michigan tax on the ground that "this test is used to analyze the constitutionality of state taxation statutes which tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, * * * not regulatory statutes." *Id.* at 29a n.16. Because the court had found the Michigan tax to be a "regulatory fee," it disregarded *Complete Auto Transit* and instead applied the balancing test used by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to assess the constitutionality of state *regulations* affecting interstate commerce. See App., *infra*, 29a n.16, 31a-32a.

The court recognized that even "regulatory fees" may not discriminate against interstate commerce, and acknowledged that, under the Michigan tax, it "may be" that "mixed [interstate and intrastate] carriers invariably will pay a higher per mile fee than the carrier who operates solely intrastate." App., *infra*, 30a-31a. The court similarly noted the possibility "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." *Ibid.* But the court nevertheless rejected the claim of discrimination against interstate operations, opining that the prospect of discrimination "is a matter of pure speculation" because petitioners "present no evidence that any trucking firm's route choices are affected by imposition of the fee." *Id.* at 31a. The court added that "[a]ny effect the fee has on interstate commerce is incidental and does

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[5] The court undertook this analysis in response to the argument that various Michigan levies, including the Michigan tax, "are unconstitutional taxes in violation of various sections of the Michigan constitution." App., *infra*, 20a. The court concluded that state law distinguished between "a permissible fee" and "an illegal tax," and that the challenged levies should be characterized as fees for purposes of Michigan law. *Ibid.*; see *id.* at 22a-24a.

not rise to the level of discrimination." *Ibid.* The court went on to uphold the Michigan tax under the standard articulated in *Pike* v. *Bruce Church* because "we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." *Id.* at 31a-32a.

The Michigan Supreme Court denied review without opinion. App., *infra*, 61a-63a.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether the fair apportionment and anti-discrimination requirements of the Commerce Clause invalidate flat state taxes on participants in interstate commerce. The decision below, which approved such a tax, should not stand. That decision cannot be reconciled with *Scheiner* and other of this Court's precedents; contributes to a growing disarray in the lower courts about the meaning of the controlling Commerce Clause principles; and reads a wholly illogical and unadministrable distinction into the law. Because the legal question presented here is one of considerable significance to jurisdictions across the Nation, review of the decision below is warranted.

A. The Decision Below Cannot Be Reconciled With This Court's Precedents Requiring The Apportionment Of Taxes On Participants In Interstate Commerce

1. Flat taxes like the Michigan tax do not satisfy the Commerce Clause apportionment requirement

At the outset, there can be no doubt that the decision below is inconsistent with this Court's precedents regarding the necessity of apportioning state taxes that fall on participants in interstate commerce – and that it offers other courts and state taxing authorities a roadmap for evading Commerce Clause requirements. A fundamental purpose of the Clause is to

preclude States from "'tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Scheiner*, 483 U.S. at 280 (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)). As we have noted, the test articulated in *Complete Auto Transit* gives force to this requirement by mandating that a state tax be deemed unconstitutional unless, among other things, it is "fairly apportioned." *Complete Auto Transit*, 430 U.S at 279.

Satisfaction of the apportionment requirement is in turn determined by application of the "internal consistency" test. As the Court has explained,

> *any* threat of malapportionment [is assessed] by asking whether the tax is "internally consistent" * * * . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*[.]

Jefferson Lines, 514 U.S. at 185 (emphasis added). See also *Tyler Pipe Indus.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); *Armco*, 467 U.S. at 644-646. *All* taxes therefore must be judged for internal consistency, with failure of the internal consistency test establishing unconstitutionality of the tax as a matter of law. And flat taxes such as Michigan's necessarily fail the test.

The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their constitutional defects to the levy challenged

here, explains why this is so. *Scheiner* involved a challenge to two flat taxes – a "marker fee" and an "axle tax" – imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by the States'" (*id.* at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are not borne by equivalent intrastate activity – and that is so whether the flat tax is imposed on the privilege of entering the state or on the privilege of engaging in business within the state. Imagine, for example, a flat tax of $100 (like the one set by Michigan in this case) that is imposed on all trucks that use a State's roads to make an intrastate delivery. If identical taxes were imposed by the 48 contiguous States, a truck that traveled across the country and made intrastate as well as interstate deliveries along the way would pay annual fees of as much as $4800; an identical truck that confined its business to one State but traveled the same number of miles and made the same number of intrastate trips would pay only $100. As a

consequence, it is inevitable that flat levies like the Michigan tax are malapportioned because they "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Id.* at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1188 (1986)).

With this principle in mind, one of the leading commentators in this area has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine * * * . This conclusion follows inexorably from a simple application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted). See also *Scheiner*, 483 U.S. at 303-304 (Scalia J., dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate

activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).[6]

Here, the Michigan tax plainly fails the internal consistency test: it is a flat, unapportioned levy that is imposed on interstate trucks whenever a portion of their trip has an intrastate component in Michigan. If replicated by other states, such a tax would impose potentially crushing, cumulative burdens on trucks traveling in interstate commerce. Indeed, in its practical effect the Michigan tax is *more* pernicious than the one invalidated in *Scheiner* because it penalizes interstate carriers who choose to compete with local truckers for intrastate business in Michigan. Under the Michigan tax regime, local and interstate businesses pay the same amount for a privilege that is inherently more valuable to the local company – a reality that will either put interstate carriers at a competitive disadvantage or induce those carriers to abandon the intrastate market altogether. By the same token, because Michigan truckers would run the risk of subjecting themselves to intrastate fees imposed by other states were they to cross state lines, the Michigan tax also certainly "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325,

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[6] Many other courts have invoked *Scheiner* to invalidate a wide range of flat state taxes or fees. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns* v. *State*, 556 N.W.2d 761 (Wis. Ct. App.) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

333 (1996). Such an outcome is precisely what the Commerce Clause apportionment requirement was designed to avoid.[7]

2. *A levy cannot escape the apportionment requirement simply because its proceeds are used for regulatory purposes*

In nevertheless upholding the constitutionality of the Michigan levy, the court below did not deny that the tax was unapportioned and did not attempt to reconcile its decision with the mandate of *Scheiner*. Instead, the court held that a tax need not satisfy the *Complete Auto Transit* test and the requirement of internal consistency – and, in fact, is not subject to the apportionment requirement *at all* – so long as it is "regulatory" in nature. The Michigan tax is "regulatory," the court had earlier concluded, because its proceeds are devoted to "promoting and regulating safe use of the highways" and the aggregate amount of the fees collected is "proportionate to the cost of the regulation." App., *infra*, 24a. See also note 2, *supra*. Having

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[7] It is no answer to this point to suggest, as the State did below, that a carrier with a fleet of many trucks could avoid competitive disadvantage by dedicating a portion of its fleet exclusively to intrastate commerce in Michigan. As this Court has held repeatedly, "such promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent" (*Fulton Corp.*, 516 U.S. at 333 n.3); a state may not impose "a tax which is 'discriminatory in favor of the local merchant'" so as to "encourag[e] an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963) (citation omitted). Moreover, the approach suggested by the State simply is not practical. An out-of-state carrier with many trucks cannot know in advance which vehicles will be in position to take advantage of the opportunity to make an intrastate haul in Michigan; a carrier that hopes to get intrastate business as that business becomes available will have no choice but to register all of its trucks in Michigan – and in all other states that adopt similar intrastate fees.

thus characterized the levy here as "regulatory," the court rejected fair apportionment as a requirement and concluded that the applicable standard is the one set forth in *Pike* v. *Bruce Church* for assessing the validity under the Commerce Clause of regulations themselves, *not* levies used to pay for regulatory activity.[8]

This holding, however, rests on a manifest evasion of this Court's precedents. As noted above, the Court has established that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185. And whatever the validity of a Commerce Clause distinction between taxes and *regulations*, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Michigan court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 279, 288.

It therefore is no surprise that the Michigan court's decision to hinge the constitutionality of the tax on the uses to which the tax revenue will be put departs from this Court's holdings in

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[8] If the court below meant to suggest that the *Complete Auto Transit* test applies only to state taxes that "tax interstate commerce itself" (App., *infra*, 29a n.16), it plainly was wrong. In fact, "[s]tate taxes levied on a 'local' activity preceding entry of goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616 (1981). Such a tax "must be evaluated under *Complete Auto Transit*'s four-part test." *Id.* at 617.

several fundamental respects. *First*, the court below disregarded the undeniable fact that the Michigan tax's effect on interstate commerce is essentially identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies, if imposed by other states, would have had a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Scheiner*, 483 U.S. at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). In both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id.* at 291 (citation omitted). And in both cases the effect of the tax was to "exert an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). Like the levy in *Scheiner*, the Michigan tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) – and that is the crucial consideration for Commerce Clause purposes.

Thus, as Professor Hellerstein has observed,

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157.

Second, the distinction drawn by the Michigan court – between a tax whose revenues are used "to enforce [regulatory] provisions" and a tax "designed to raise revenue for the general public" (App., *infra*, 24a) – makes no sense when applied to the Commerce Clause. For reasons we have just noted, the burden on interstate commerce is not reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway repairs. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on interstate trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably "regulatory" activity. Indeed, such a "regulatory fee" would, if anything, appear to be *more* burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy: the trucker would both pay the tax *and* bear the burden of potentially costly state regulation.[9]

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[9] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy. See, *e.g.*, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (addressing whether a particular charge is a "fee" within the meaning of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 9701); *Union Pac. R. Co.* v. *Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b), recodified at § 11501). But these decisions have no bearing on the

Third, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees, such as highway tolls, that have survived Commerce Clause attack. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972)). Here, the Michigan court opined that the tax at issue is "proportionate to the cost of regulation" (App., *infra*, 24a) – but it meant by this that fee revenue *in the aggregate* was used to pay for the State's regulatory program. See *id.* at 25a-26a. By definition, such a fee, which does not vary according to mileage traveled or number of trips taken, cannot reflect a reasonable approximation of the *individual taxpayer's* use of state services.

Fourth, the line drawn by the court below invites inconsistency and manipulation. Because that line is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Michigan court declared the challenged tax to be regulatory because its proceeds ostensibly are used to "promot[e] and regulat[e] safe use of the highways." App., *infra*, 24a. But this approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen – a danger that is particularly acute

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question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees. See Rothfeld, *Scheiner's Next Wave: Distinguishing Taxes From Fees Under the Commerce Clause*, 17 STATE TAX NOTES 1681, 1686 (1999).

because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the federal apportionment requirement.[10] As a consequence, the Michigan court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden to out-of-state taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

3. The lower courts have taken conflicting approaches to the Commerce Clause apportionment requirement

In addition to departing from this Court's precedents, the decision below contributes to considerable confusion and disarray among state courts of last resort and federal courts of appeals about the applicability of the apportionment requirement to taxes that are used to finance regulatory activity. Many courts have faithfully applied *Scheiner*, holding in a range of settings that flat taxes on interstate commerce (in particular, on interstate motor carriers) fail the internal consistency test and therefore are unconstitutional. Other courts, however, have adopted the approach used below and departed from *Scheiner*, ruling that exactions need not be apportioned so long as they are levied to finance regulatory activity.

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[10] In fact, the bankruptcy of this approach is illustrated by the fact that the regulatory program assertedly served by the Michigan tax underwent a radical change in 1995, when Congress preempted state regulation of the prices, routes, and services of intrastate trucking operations. See note 2, *supra*. As the court below itself noted (App., *infra*, 23a n.11), federal law thus displaced most of the purposes served by the Michigan regulatory program pursuant to which the Michigan tax is assessed. Michigan, however, has not adjusted the amount of the fee collected. As this history suggests, it is a simple enough matter for a state to change the asserted "regulatory" justification for a fee when doing so suits its purpose.

a. The Michigan court's holding cannot be reconciled with a body of decisions that have applied the internal consistency test to invalidate taxes on interstate truckers, even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a "fee." In *American Trucking Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, the Supreme Judicial Court of Massachusetts struck down an impost that in its relevant respects was identical to the one here. Massachusetts imposed a flat $200 fee on every vehicle that entered the Commonwealth and that was engaged in the transportation of hazardous waste. The fee was used "'solely for the purposes of the administration and implementation of the permitting, compliance and enforcement, monitoring and analysis, and technical assistance programs of the department of environmental protection'" (*id.* at 99 (citation omitted)); it paid for the "random inspection of vehicles, processing monthly reports, providing education and technical assistance, and enforcement." *Id.* at 102. These purposes surely are at least as "regulatory" as those advanced by the Michigan program.

In nevertheless holding the tax invalid under the Commerce Clause, the Massachusetts court began by noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade." 613 N.E.2d at 99 n.9. The court found "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees" (*id.* at 102) and did not treat the use that Massachusetts made of the revenues collected under the fee as at all relevant to the Commerce Clause inquiry.

The Supreme Judicial Court of Maine reached the same conclusion in *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), invalidating another flat, annual per truck "hazardous material fee" imposed on vehicles that transported hazardous substances in the State. *Id.* at 1015. The fee was devoted, in part, to paying "costs related to vehicle inspection and enforcement" (*ibid.*); it also was used to support

the state hazardous waste fund, to pay administrative costs, and to finance "hazardous materials training of local and state officials." *Ibid.* Explaining that *Scheiner* "clearly elevates substance over form," the court rejected the State's argument that the internal consistency test did not apply because the tax was characterized as a "[r]egulatory [l]icense [f]ee." *Ibid.* The court went on to conclude that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'" *Id.* at 1016. That was true of the challenged levy, the court held, because

> if each state imposed such a fee, a truck traveling 100,000 miles interstate could conceivably pay 49 times more in hazardous waste tariffs than a truck that traveled 100,000 miles strictly within the state. This would clearly violate the "internal consistency test," which forbids tariffs that would interfere with free trade by penalizing some travel.

Id. at 1017 (citation omitted).

Similarly, in *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), the Seventh Circuit rejected the distinction relied upon by the court below. *Government Suppliers* invalidated a flat semi-annual fee imposed on vehicles that engaged in municipal waste collection and transportation. The fees were "used to implement the waste disposal regulatory system to which registrants are subject. They d[id] not revert to the state general fund. * * * [T]heir purpose [was] regulatory * * *." *Id.* at 1271 n.2. Relying on *Scheiner*, the court nevertheless held the fee to violate the Commerce Clause because it "raises a financial barrier around the State." *Id.* at 1281. The court added that, "[i]f other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in municipal waste would be magnified." *Id.* at 1282. Again, the court did not treat the regulatory purpose of the fee as in any way relevant to the Commerce Clause inquiry.

b. Other courts, however, have adopted the approach taken below, holding that the apportionment requirement does not apply to exactions that are used to finance regulatory activity. Thus, in *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232 (Wash. 1998), cert. denied, 526 U.S. 1066 (1999), the Washington Supreme Court upheld a flat fee used to pay for "safety programs and inspections related to trucks on Washington's roads." *Id.* at 1242. The court reasoned that a "regulatory fee [is] not a tax subject to the apportionment requirement" and that "the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure." *Id.* at 1240, 1241. Like the Michigan Court of Appeals here, the Washington court turned to the balancing test applied in *Pike* v. *Bruce Church, Inc.*, concluding that the Washington tax passed this test. *Id.* at 1240-1243.[11]

This plain inconsistency in the approaches of the lower courts warrants this Court's attention. Courts are applying the Commerce Clause in fundamentally differing ways, leading to the invalidation in some jurisdictions of taxes that are identical to those that have been upheld elsewhere. In these circumstances, the Court should grant review to bring uniformity to this important area of the law.

B. The Michigan Tax Discriminates Against Interstate Commerce

The decision below also departs from the analysis used by this and other courts in a second respect: the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax. The court below recognized that it "may be" that "the mixed [inter- and intrastate] carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate," and "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need

[11] The Washington tax was repealed before the petition for certiorari was filed in *Franks & Son*. See No. 98-1282, Pet. 3 n.3.

to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." App., *infra*, 28a. Having said that, however, the court rejected the claim of discrimination on the ground that "it is a matter of pure speculation." *Ibid.* That conclusion is insupportable.

1. To begin with, this Court has made clear that flat taxes *necessarily* discriminate against interstate interests and that empirical evidence of the discriminatory effect of such a tax is not necessary. More than fifty years ago, in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), the Court struck down a flat municipal license fee imposed on solicitors doing business in the city. The Court explained:

> the tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

Id. at 432.

The Court applied this conclusion to taxes on interstate motor carriers in *Scheiner*, noting that flat taxes necessarily disadvantage interstate businesses: "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the

privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like the Michigan tax is undeniable. On average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will a company that travels both intra- and interstate. And "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Scheiner*, 483 U.S. at 296.

For this reason, other state courts have held that empirical proof of discrimination is *not* required to invalidate a flat tax. As the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *Secretary of Admin.*, 613 N.E.2d at 101. See also *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (court finds it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (court concludes that *Scheiner* held "flat highway user taxes inherently discriminatory against interstate commerce"). The decision below cannot be reconciled with these holdings.

2. The Michigan court's understanding of the anti-discrimination principle also was flawed for a second reason. Having acknowledged the possible structural advantage that flat taxes provide to local competitors, the court rejected the claim of discrimination because it saw no evidence that in practice "the fee raises a *significant* barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." App., *infra*, 31a (emphasis added).

The conclusion that the discrimination did not actually succeed in discouraging interstate commerce (even if true), however, cannot validate a discriminatory tax. The Court has held repeatedly that, "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Oregon Waste Sys., Inc.* v. *Dept. of Env. Quality*, 511 U.S. 93, 101 (1994). The extent of the discrimination is immaterial so long as a state tax structure "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce" or to discourage interstate companies from competing for local business; the Court has "never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 & n.3 (1996). See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 578 (1997) (discrimination against interstate commerce violates the Commerce Clause even if the affected entities "are not deterred by the statute from doing a principally interstate business"). For this reason as well, the decision below should be set aside

C. The Question Presented Here Is An Important And Recurring One

The Michigan court's holding thus both departs from this Court's decisions and exacerbates a conflict among the lower courts. This case also satisfies the remaining requisite for review by this Court: the question presented here – whether a state may avoid apportioning its taxes on interstate businesses so long as it devotes the tax revenue to the financing of regulatory activity and empirical proof of discrimination has not been provided – is a recurring one of continuing practical importance.

First, as the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce – and, indeed, many impose flat taxes on interstate motor carriers that are indistinguishable in principle from the Michigan tax at issue in this case. A number of states, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[12] Revenues from these fees typically are devoted to

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[12] See, *e.g.*, Cal. Veh. Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(1)(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Admin. Regs. 28-31-10(f) ($300 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. Envir. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual $20 driver certificate fee); Mich. C.L.A. § 29.473(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Admin. Code § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.J. Admin. Code §§ 7:26G-3.3(g) and 28 N.J.Reg. 1693, 1735 (Apr. 1, 1996) (flat hazardous waste transporter fees of various amounts ranging from $40 to $274, depending on the size of the vehicle); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tex. Nat. Res. Code § 113.131 (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Nat. Res. Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103 ($200 fee for each package of radioactive material transported in State).

regulatory, enforcement, and administrative expenses identical to those found dispositive by the Michigan court.[13] The validity

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[13] See, *e.g.*, Col. Rev. Stat. Ann. §§ 42-20-107, -202(5) (fee placed in hazardous materials safety fund and used for safety and administration purposes); Conn. Gen. Stat. Ann. § 16a-106(c) (fee used for "administering the provisions of this section"); 7 Del. Code Ann. § 6006(5)) (fee used "to carry out the purposes of this chapter"); Kan. Stat. Ann. § 65-3431(u) (fee used "for monitoring the transportation of hazardous wastes"); Mich. C.L.A. § 29.475(4) (fee devoted to "implementation of this act"); N.J. Stat. Ann. § 13:1E-18 (fees devoted to "services to be performed," including hazardous waste transporter enforcement operations, special investigations, and roadside checks); N.Y. ECL § 72-0201(11)(b) (one-half of hazardous waste transporter fees used "for the purposes of carrying out the provisions of this chapter"); N.C. Gen. Stat. § 130A-294.1(b) (fee used to provide technical assistance, facilitate "timely review of permit applications," insure that permit decisions are made on a sound basis, "[i]mprove monitoring and compliance of the hazardous waste management program," "[i]ncrease the frequency of inspections," provide support for the waste management program, and "[p]rovide resources for emergency response").

of the test used below to uphold the Michigan tax accordingly raises a vital question that will have to be addressed by this Court sooner or later. This case offers a suitable vehicle with which to provide such review.

Second, the Michigan court's decision will foment continuing litigation about the validity of unapportioned taxes. In response to the holding in *Scheiner*, several states candidly acknowledged that their flat motor carrier fees were unconstitutional.[14] But other states began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[15] or by contending that their taxes *were* per se properly apportioned because they were "user fees,"[16] or by asserting that the apportionment requirement was inapplicable because the costs imposed upon the state were unrelated to the miles traveled by the taxpayer in the jurisdiction.[17] The decision below marks the latest skirmish in this campaign and will provide powerful support and encouragement for additional litigation in this area. If flat "regulatory fees" are constitutional, legislators should be so informed and permitted to exercise their taxing authority freely; if those fees violate the Commerce Clause, the governing rules should be stated clearly so that states and localities may conform their taxes to constitutional requirements.

Third, the amount at stake in this one case is substantial. The amount of back taxes currently at issue in this litigation totals approximately $70 million. And interstate truckers

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[14] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *Conway*, 566 A.2d at 1337.

[15] See, *e.g.*, *American Trucking Ass'ns* v. *State*, 556 N.W.2d at 767-768.

[16] See, *e.g.*, *Secretary of Admin.*, 613 N.E.2d at 101-103.

[17] See, *e.g.*, *Secretary of State*, 595 A.2d at 1016.

continue to accrue some $3 million dollars in additional liability to Michigan every year under the Michigan tax. Because the legal issues here are important and recurring ones, and because the practical effects of the Michigan tax are significant, further review of the decision below plainly is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2004

APPENDIX

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 22 6052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL

CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., M CKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC.. UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC.. TOM THUMB SERVICES. INC., d/b/a RE1, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants.

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY. DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In this consolidated class action suit, plaintiffs, individual class representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998 judgment, which granted summary disposition in favor of defendants. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC § 11501, 49 USC § 11506, and section 601(h) of the Federal Aviation Administration Authorization Act of 1994 ["FAAAA"], on various provisions of Michigan's Motor Carrier Act ["MCA"]. This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc, et al, filed their complaint, and alleged that the $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC § 11506 and 49 USC § 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc, et al, filed their complaint, and made similar allegations.

In Michigan, since 1933, motor carrier regulation has been pursuant to the Michigan Motor Carrier Act ["MCA"]. MCL 475.1 *et seq.* The act authorizes the Michigan Public Service Commission ["PSC"] to enforce the act. MCL 475.1(c): MCL 475.2. Under the MCA. motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 per vehicle for the administration of the act. MCL 478.2(1) and (2). Subsection (1) applies to motor carrier vehicles which operate intrastate pursuant to a certificate of authority, while subsection (2) applies to motor carrier vehicles license-plated in Michigan

who engage entirely in interstate commerce.[1] The act also provides that motor carriers which are registered outside Michigan are required to pay a registration fee of $10 per vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, and alleged that the intrastate decal fee violated the Commerce Clause, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc, et al, and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs fled two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10); one regarding their intrastate preemption claim and the other regarding their interstate preemption claim. On June 30, 1995, intervening plaintiffs fled their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their violation of the Commerce Clause claim. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998, concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition pursuant to an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998 opinion.

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[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

The court concluded that section 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law only imposed the $10 maximum on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not more heavily burden foreign motor carriers as compared to Michigan motor carriers engaged in interstate commerce, as the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages. there is no genuine issue as to any material fact. and the moving party is entitled to judgment or partial judgment as a matter of lave. [MCR 2.1 16(C)(10).]

A motion for summary disposition under MCR 2.1 1 6(C)(10) tests whether there is factual support for a claim. and is reviewed de novo on appeal. *Spiek v Dept or Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the

nonmovant. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618: 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC § 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Kohynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co v Coyn,*. 482 US 1, 8;107 S Ct 2211; 96 L Ed 2d 1(1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art 6, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron c Eastern R Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999). Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC § 11506 provided, in part,

> (b) General rule.--The requirement of a State that a motor carrier, providing transportation subject to

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[2] This statute is currently codified as 49 USC § 14504; however, we will refer to the law as § 11506.

> jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c).
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> When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
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> (c) Single State registration system.--
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> (1) In general.--The Secretary shall maintain standards for implementing a system under which--
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> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;
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> (B) the State of registration shall fully comply with standards prescribed under this section; and
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> (C) such single State registration shall be deemed to satisfy the registration requirements of all other States.
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> (2) Specific requirements.--
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> (A) Evidence of Federal registration; proof of insurance; payment of fees.-- Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part--

(i) to file and maintain evidence of such Federal registration:

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system.--The standards of the Secretary--

(i) shall require that the registration State issue a receipt, in a form prescribed under the standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles:

(iii) shall not require decals. stamps. cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that--

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15,1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees.--The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA only applies to entities engaged in interstate commerce to the extent it is consistent with federal law. MCL 478.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which

is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System ["SSRS"} on January 1, 1994. With the implementation of the SSRS, § l 1506 was amended and significant language changes were made; We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful.

Beginning in I965, Congress authorized States to require interstate motor carriers operating within their border to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 8u170, 79 Stat 648.49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Id.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration*, 9 ICC 2d 610, 610 (1993).

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[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States, outweighed the benefits to those States and to the public. HR Rep No 102-171, pt l, 49 (1991); HR Conf Rep No 102-404, 437-438 (1991); US Code Cong & Admin News 1991, 1526, l 679: In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.[4] See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § l 1506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would--on behalf of all other participating States--register a carrier's vehicles, file and maintain paperwork, and collect and distribute registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § I I506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system ... that

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[4] Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(0(1).

(I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates. (11) will minimize the costs of complying with the registration system, and (111) will result in a fee for each participating State that is equal to the fee, not to exceed 510 per vehicle, that such State collected or charged as of November 15, 1991." § 1 I506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICUs fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C). [*Yellow Transportation, Inc v Michigan*, US :123 S Ct 371, 374-375:154 L Ed 2d 377 (2002).]

A

Plaintiffs argue that the federal statutory language is clear, a state may charge a maximum registration fee of $10 per vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiff acknowledges that MCL 478.7 reflects the mandate of § 11506 with regards to out-of-state registered motor carriers,[5] and asserts that Michigan registered motor carriers are required to be charged similarly.

Defendants' counter-argument is two-fold. First, § 11506 only applies to registration fees, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 only applies to participating states, not the

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[5] MCL 478.7 provides, in part,

(4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

registration state. The court agreed with defendants' argument, and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations which interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however, any state registration requirements which are in excess of the standards in § 11506(c) are considered an unreasonable burden. § 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. § 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. § 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[6] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra* at 376. and. therefore, can be a registration state.

The registration state may require a motor carrier to (l) file proof of its federal registration [ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. § 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. § 11506(c)(2)(B). The fee is for the filing of the

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[6] 49 CFR 1023.1 *et seq* was recodified as 49 CFR 367.1 *et seq*.

proof: of insurance, and may not be charged for the filing of the motor carrier's ICC permit. §11506(c)(2)(B)(iv) and (v).

In support of the registration fee, the motor carrier must file with the registration state a form which delineates (l) the number of vehicles it intends to operate in each participating state, (2) the per vehicle fee each participating state charges, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The per vehicle fee each participating state is allowed to charge is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. § 11506(c)(2)(B)(iv)(III): 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[] the cost of complying with the registration system" for the motor carriers, § 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404, reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge can not exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, such that it is subject to the limitation in § 11506, or a regulatory fee. Plaintiffs assert that

the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Sons, Inc v. Washington*, 966 P2d 1232, 1243 (Wash 1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The Court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.*

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[7] If a fee's purpose is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in MCL 487.2(2) is not a registration fee, it is not subject to preemption by 49 USC § 11506.

Plaintiff argues that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v. State Treasurer*, 458 NE2d 66 (Ill Ct App 1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 68. At the time, the federal regulation allowed

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[7] Because Michigan plated vehicles which operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, inc v Michigan (On Remand)*, 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles plated in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. Id. at 69. Plaintiff contends that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted "again parenthetically." that the federal regulation, 49 CFR 1023.33 (redesignated). was amended and set the limit at $10. *Roadway Express, supra* at 69.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, that one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carrier for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carrier within their borders. Therefore, the ability of a state to collect fees in addition to the registration fees was not affected by the removal of the language providing for additional fees from § 1023.33.[8]

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[8] We note that the substance of 49 CFR 1023.104 and 1023.105 were not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state imposed regulatory fees. The statute and its regulations only address registration requirements. Because there is a presumption against federal preemption, we believe that Congress' silence cannot be interpreted as prohibiting state regulatory fees, see

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year statute of limitations, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part,

> (b) The requirement of a State that a motor carrier ... register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(I) and (2) of this title when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
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> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission... .

The Commission prescribed the following interpretive regulation:

The application for the issuance of such identification stamps or number shall .. . be duly completed and executed

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Wisconsin Pub Intervenor v Mortier, 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can co-exist in the same field without conflicting, *Duprey, supra* at 665.

by an official of the motor carrier, and shall be accompanied by the fee, if any, proscribed by the law of such State; provided, however. that such fee shall not exceed $l0 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored §11506(c) as amended in 1994. Because we concluded above that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[9] Accordingly, the court did not err in granting defendants' summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Section 601(h), which became effective on January 1, 1995, prohibited state regulation of price, route or service of motor carriers, save for a few delineated exceptions. [currently codified as] 49 USC § 14501(c).

Plaintiffs argue that the court erred in granting defendants' summary disposition on this issue before

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[9] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

discovery was complete.[10] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized. the intrastate fees are prohibited by federal law.

In re Motor Carrier Act, 223 Mich App 288.302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal legislation preempting at least some aspects of state regulation." *Id.* at 300. In regards to the fee provisions at issue, the Court stated,

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL § 479.41; MSA § 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL § 478.1; MSA § 22.560, for protesting an application for a certificate. MCL § 478.1a; MSA § 22.560(1), and for administering the act, MCL § 478.2(1): MSA § 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now

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[10] We note that plaintiffs do not contest the court's summary disposition ruling, that § 601 did not preempt the intrastate fees.

preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90 to 120-day stay in the proceedings to conduct discovery in order to present a factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motion for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim.

Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which it specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case. and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they felt its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs' renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court which obtained the correct result, albeit

for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, *et al* allege, that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp.* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related: and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp.* 236 Mich App 141,151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of the [MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

> to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the

> transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances, charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.][11]

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[11] Any purposes which related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the legislature has yet to amend the MCA to reflect the federal preemption.

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act which carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *Graham, supra* at 151, and thus benefit the general public.

Plaintiffs argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[12] they became taxes because the amounts collected were in excess of the services' expenses. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Graham, supra* at 151. "[W]here revenue generated by a 'regulatory fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v City of Madison Heights*, 211 Mich App 265. 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of

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[12] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and could only offer their opinion as to how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-1983 to 1994-1995,[13] and one of the charts showed that there was a surplus nearly every year.[14]

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1) and defendants confirmed with the report's author that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding non-challenged interstate

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[13] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers as a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC which enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the legislature in accordance with the constitution to fund the civil service. 1963 Const, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[14] Plaintiffs present no evidence as to the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by section 601 of the FAAAA. Therefore, we have no basis on which to determine the fees' proportionality after 1995.

fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 1 I.7%, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the trial court did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because without paying it, a motor carrier cannot operate its trucks in Michigan. Defendants argue that a motor carrier has a choice as to what extent its trucks will have a presence in Michigan, and. therefore, the exaction is voluntary. While this is true in regards to the application fee, MCL 478.1, defendants' logic is erroneous in regards to the administration fee. MCL 478.2(1), because every vehicle plated in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary. when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees. Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants' summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the equal protection clause of the United States and Michigan Constitutions because they only apply to "for hire" motor carriers and not to private motor carriers.[15] Both the federal and state constitutions guarantee equal protection, and

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[15] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

afford similar protection. Const 1963, art l, § 2; US Const, Am 14, § 1; *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz*, 461 Mich .1 5, 24; 597 NW2d 148 (1999).

Legislative classifications which do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dept of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001); Vargo, supra at 60. Under the rational basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular group, or if the rationale seems to be tenuous. *People v Copper (After Remand)*, 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic and safety regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one which receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing

Crego v Coleman, 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that such carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor carrier Act, supra* at 301, recognized, the PSC "still had significant regulatory obligations," including supervising and regulating the safety of motor carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns as before still existed. Accordingly, we conclude that the legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants' summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the trial court.

The Commerce Clause provides that Congress "shall have power ... [t]o regulate commerce ... among the several states." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, inc v Dept of Environmental Quality of the State of Oregon*, 511 US 93, 98;114 S Ct 1345;128 L Ed 2d 13 (1994).

The trial court held that the Commerce Clause was not implicated because the fee only applied to intrastate carriers. However, any tax or regulation which effects interstate

travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment, Inc v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the trial court did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dept of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dept of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[16] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the loaner and burdens the latter. *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New*

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[16] Intervening plaintiffs contend that the four-prong test enunciated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'n v Schemer*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state taxation statutes which tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

York State Liquor Authority, 476 US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminates against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkston, NY*, 511 US 383.390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers which are plated in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 per vehicle. MCL 478.2(2) requires that motor carriers which are plated in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers plated in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Co-op Corp v Arkansas Pub Service Comm*, 461 US 375, 394;103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles which pay the fee operate solely intrastate, which presumably leads to their conclusion that the impact on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co v Limbach*, 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, Manager of Licensing and Fuel for intervening plaintiff TNT Holland Motor Express, Inc, stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was only done because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates even-handedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity exists. *Raymond Motor Transportation, Inc v Rice*, 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). Based on the record before us, we cannot say that the burden imposed on interstate commerce by the $ 100 annual fee is clearly excessive in relation to Michigan's substantial interest regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the trial court's summary disposition ruling in favor of

defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

APPENDIX B

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,
Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, et al.,
Defendants.

No. 95-15628-CM

TROY CAB, INC., et al.,
Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,

v.

STATE OF MICHIGAN, et al.,
Defendants.

No. 95-15631-CM

Opinion

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of

certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law are not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, *et seq;* MSA 22.531, *et seq*. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) an application for a certificate of authority or a permit, whether granted or not. That application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate

commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs, primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. *Id.* This is especially true of state regulation of matters related to health and safety. *Id.* The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. *Id*, p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. *Id.* Such considerations include "'the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id*, quoting *Medtronic, Inc v Lohr*, 518 US ___; 116 S Ct 2240, 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added subsection (h), "Preemption of State economic regulation of motor carriers," to 49 U.S.C. 11501, subsequently recodified as 49 U.S.C. 14501.[1] By virtue of § 601, effective January 1,

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[1] The entirely of this preemption provision is quoted in *In re Federal Preemption of Provisions of the Motor Carrier Act*, 223

1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier… or any motor private carrier with respect to the transportation of property." 49 U.S.C. 11501(h)(1), now recodified as 49 U.S.C. 14501(c)(1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See *'Fitzpatrick v Simmons Airlines, Inc.*, 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. *Id.*

In *Morales v Trans World Airlines, Inc.*, 504 US 374, 383; 112 S. Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase "relating to" expressed a broad preemptive congressional purpose. See *In re Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); *Fitzpatrick*, supra. *Morales*, p 384, determined that state laws having a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See *Fitzpatrick*, p 692. Indeed, *Morales*, p 386, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of preemption or its effect on that area is only indirect.[2] *Morales* held, p 391, that a state law

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Mich App 288, 293-294; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998).

[2] On the other hand, *Morales*, p390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect –

requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord *American Airlines, Inc. v Wolens*, 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995); state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the *Fitzpatrick* court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in *Morales* required the conclusion that judicial enforcement of the Michigan Civil Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in *Fitzpatrick*, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4] Thus, the question is whether the Michigan

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without, however, explaining what was meant by those terms of qualification or how they should be applied to "a border-line question." Rather, *Morales* said only that "we express no views about where it would be appropriate to draw the line." *Id*, quoting *Shaw v Delta Airlines, Inc.*, 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

[3] That ruling was recently limited by *Gilman v Northwest Airlines, Inc.*, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. *Gilman*, at 298-300, distinguished *Fitzpatrick*, supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants

requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See *Morales*, supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. *Id*, p 390.

While the tenuousness or peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in *American Airlines v Wolens*, supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation in the operation of an air carrier.'" That view was prefigured in *Morales*, supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as *American Airlines* stated at 728, "stops States from

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for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See *In re Federal Preemption*, supra, p 297.

imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in *In re Federal Preemption*, supra, p 295:

> "the PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service – the essence of economic regulation. The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. . . . Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. *Id*, p 298.

Even so, the court in *In re Federal Preemption*, p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a

> statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . . Furthermore, the House Conference Report indicates that "economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. . . . . The argument that Congress intended to preempt the entire filed of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also *Michigan Trucking Ass'n v Public Service Comm (on Remand)*, 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the *Federal Preemption* court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H.R. Conf. Rep. No. 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It

> follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1) MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants . . . have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation."

The Court of Appeals has spoken. In two published decisions, *Federal Preemption* and *Michigan Trucking Ass'n*, supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 U.S.C. 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per

vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." *Federal Preemption,* supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states." however, not on the 'registering state." The SSRS neither prohibits no preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that

constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in interstate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite *American Trucking Ass'ns v Scheiner,* 483 US 266, 282; 107 S Ct. 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As *Goldberg v Sweet,* 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "in *Scheiner*, we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissible under the principles enunciated in *Scheiner*. Plaintiffs' reliance on *Scheiner* is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such

usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." *Federal Preemption,* supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, *Scheiner* itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the *Scheiner* Court did not adhere to it. Neither did the Court of Appeals in *Federal Pre-emption,* supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state *tax laws* to motor carriers." (Emphasis added.)

residents who also engage in commerce among States." *Id,* p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to interstate operations. As was said in *Scheiner*, p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this opinion may enter upon its proper presentation.

[s]
JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

APPENDIX C

STATE OF MICHIGAN
IN THE COURT OF CLAIMS
DOCKET NO. 95-15628-CM
WESTLAKE TRANSPORTATION, INC., et al.,
Plaintiffs,
and
AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,
-vs-
MICHIGAN PUBLIC SERVICE COMMISSION, et al.
Defendants.

DOCKET NO. 95-15631-CM
TROY CAB, INC., et al.,
Plaintiffs,
and
AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,
-vs-
STATE OF MICHIGAN, et al.,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court held in the
City of Lansing on the 7th day of
March, 2000.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on December 30, 1998 an order granting Defendants' renewed Motion for Summary Disposition and dismissing these consolidated complaints challenging the constitutionality of certain fees imposed on the trucking industry by Michigan law as administered by the Public Service Commission; Plaintiffs having filed a Motion for Reconsideration and brief in support; the Court having reviewed the motion and brief, and being fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Reconsideration is DENIED, because it does not appear that the order of dismissal was erroneously entered. The motion does little more than rehash issues presented and decided earlier. "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonably implication, will not be granted." MCR 2.119(F)(3). Plaintiffs fail to demonstrate palpable error by which the Court has been misled. *Id.* Thus, there is not need to address each of Plaintiffs' renewed issues. The Court will comment, however, on the salient problems presented in the motion, principally those challenging the constitutionality of certain fees, identified and cited in the Court's written opinion of October 13, 1998, imposed on for-hire motor carriers by the Motor Carrier Act (MCA).

There is a presumption favoring the constitutionality of statues. *McDougall v. Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999); *H.J. Tucker & Associates, Inc. v. Allied Chucker & Engineering Co.* 234 Mich App.550, 556; 595 NW2d 176 (1999). In den 461 Mich. 944 (2000). Not only are statutes presumed constitutional but Michigan courts also have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Mahaffey v. Attorney General*, 222 Mich. App. 325, 344; 564 NW2d 104 (1997). A successful challenge to the facial constitutionality or a statute must establish that there exit no circumstances under

which the statute would be valid. *Council of Organizations & Others for Education About Parachiaid v. Governor*, 455 Mich. 557, 568 & 602; 566 NW2d 208 (1997), quoting *United States v. Salerno*, 481 U.S. 739, 745; 107 S. Ct. 2095; 95 L. Ed. 2d. 697 (1987). Indeed, an interpretation of the Constitution that does not result in a statute being found invalid is preferred to one that does. *House Speaker v. Governor*, 443 Mich. 560, 585; 506 NW2d 190 (1993), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175; 2 L. Ed. 60 (1803). Plaintiffs fail to overcome the presumption.

Accordingly, it is the Court's duty to determine whether the MCA is capable of any construction that would make it constitutional. *Michigan United Conservation Club v. Dep't of Treasury*, ___ Mich App ___; NW2d ___ (opinion by Judge Markey, docket 208429, issued December 10, 1999), slip opinion, p. 4. Are the fees imposed on for-hire carriers by the MCA at odds with the plain language of the Constitution? The Court has already determined, by the order of December 30, 1998, that they are not. The same conclusion must prevail here.

Plaintiffs assert first that these fees are invalid and the Court must order that they be at least partially refunded because they are actually, taxes that have not been properly adopted in accordance with the constitutional requirements. They contend that the fees are disproportionate to the necessary costs of regulating for-hire motor carriers, and that the moneys collected from the fees are largely used as general revenue to finance other aspects of government activity. They also point to *Yellow Freight System, Inc. v. Michigan*, 231 Mich. App. 194, 208; 585 NW2d 762 (1998), where the Court of Appeals opined that revenue collection "in the form of a fee" imposed by the MCA should be treated like "state tax cases" for purposes of 42 U.S.C. 1983 and the rule enunciated in *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm*, 515 US 582; 115 S. Ct 2351; 132 L.

Ed.2d 509 (1995). This Court, they suggest, should therefore treat these fees as if they were taxes. The Court disagrees.

There is no bright-line test for distinguishing a tax from a fee. *Bolt v. City of Lansing*, 459 Mich. 152, 160; 587 NW.2d 264 (1998); *Graham v. Kockville Twp*, 236 Mich. App. 141, 150; 599 NW2d 793 (1999). Whether the charges exacted for these applications and renewals of authority and for truck decals are properly characterized as fees or taxes requires consideration of several factors. *Bolt* at 161. No single factor is determinative of the distinction; rather, all factors should be considered in determining whether together they preponderate in one direction or the other. *Id.* at 163-169. Accord *Graham* at 151, citing *Bolt* at 167, n 16: "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."

Generally, a fee is paid for a service rendered or a benefit conferred where there is "some reasonable relationship" between the amount of the fee and the value of the service or benefit, whereas a tax is meant simply to raise revenue. *Bolt* at 161, quoting *Saginaw Co. v. John Sexton Corp. of Michigan*, 232 Mich. App. 202, 210; 591 NW2d 52 (1998). Exactions imposed primarily for public rather than private purposes are taxes; the revenue raised by taxes inures to the benefit of all, as opposed to fees paid by a few for benefits that inure to the persons or group assessed. *Id.*, citing *Bray v. Dep't of State*, 418 Mich. 149, 162; 341 NW2d 92 (1983), which quoted *Dukesherer Farms, Inc. v. Dep't of Agriculture (After Remand)*, 405 Mich. 1, 15-16; 273 NW2d 877 (1979).[1]

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[1] This "factor" can be confusing if it is mistakenly thought to require that the moneys acquired from fees never be used to benefit the public. On the contrary, regulatory fees such as those at issue here are an exercise of the police power of the community whose

Three criteria apply to the distinction between a fee and a tax. The first criterion requires that a fee serve a regulatory rather than a revenue-raising purpose. *Bolt*, *supra*, citing *Merrelli v. St. Clair Shores* 355 Mich. 575, 583-584; 96 NW2d 144 (1959), which quoted *Vernor v. Secretary of State*, 179 Mich. 157, 167-170; 146 NW 338 (1914).[2] The second criterion requires that a fee be proportionate to the necessary cost of the benefit or service provided. *Id.* at 162, citing *Merrelli*, *supra*, and *Bray*, *supra* at 160, and quoting *Vernor*, supra at 167. The third criterion requires that a fee be characterized by some degree of "voluntariness" in that those who pay it be able to refuse or limit their use of the benefit or service. Id. at 162-163, citing *Ripperger v. Grant Rapids*, 338 Mich. 682, 686; 62 NW2d 585 (1954), which quoted *Jones v. Detroit Water Comm'rs*, 34 Mich. 273, 275 (1876).[3]

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purpose is the protection of the public health, safety and welfare. Indeed, "such moneys are incidental to the accomplishment of the primary purpose of guarding the pubic." *Merrelli v. St. Clair Shores*, 355 Mich. 575, 583; 96 NW2d 144 (1959).

[2] Citing the same precedent, *Graham*, *supra*, recently qualified the first criterion by saying that a fee can have a secondary revenue-raising purpose without having to treat the fee as a tax: "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." The principle applies here.

[3] But see *Bolt v. City of Lansing* (*On Remand)*, 238 Mich. App. 37, 45-48; ___ NW2d ___ (1999), where it appears that confusion over the historic import of these factors persists. This Court agrees with Judge Markman's dissent, pp. 67-71, pointing out that the Supreme Court in *Bolt*, supra, relied on long-established precedent in distinguishing fees from taxes and did not create some "new" test of the difference between them. This Court also agrees with the dissent, at 71, when it says "in virtually all such disputes, the application of a 'totality of factors' tests will inevitably entail some

The challenged fees are not unlawful taxes. As was summarized in *Bolt*, *supra* at 162, quoting *Vernor*, *supra* at 167:

> "'To be sustained [as a regulatory fee], the act we are here considering must be one for regulation only, and not as a means of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies.'" (Brackets in original.)

In *Merrelli*, *supra* at 583-584, quoting *Vernor*, *supra* at 168, the proportionality of a fee was linked to its presumed reasonability:

> "' [W]hat is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence. . . .
>
> "' In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of

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uncertainty in terms of the ultimate result, while also affording both sides some measure of reasonable argument." That, however, puts the Markman dissent in close proximity to that in *Bolt* at 176, where Justice Boyle expressed strong doubt, shared by this Court, that the "test" is straightforward and consistent enough to be applied with any degree of precision to this "legal conundrum." But perhaps that should go without saying where the test is admittedly not one of "bright lines" — which is, incidentally, one reason for the *Bolt* decision having split 4:3.

proportion to the expense involved, it will be declared a tax. * * *"" (Cites deleted.)

As *Vernor* also said at 168, in important language not quoted in *Merrelli*, "If revenue is incidentally derived which is not so disproportionate as to make the fee charged unreasonable, there can be no objection." Accord *Graham*, *supra* (see footnote 2). That is the case here.

The Court determines that the MCA fees are not "wholly out of proportion to the expense involved" in the Commission's regulation of the motor carrier industry. The revenue incidentally derived therefrom, even if in excess of the necessary costs of regulation, is not so disproportionate as to render these fees unreasonable — especially since they are supportive of the underlying regulatory purpose. *Graham*, *supra*. Payment of the fees is not compulsory inasmuch as carriers choose just how much of a presence in Michigan, if any, they want their trucks to have. Consistent with the criteria set out in *Bolt*, supra at 161-162, these fees serve a regulatory purpose, are proportionate to the necessary costs of the regulatory service and are voluntary. Compare *Graham*, *supra* at 152-156. The Court must therefore defer to the sound discretion of the legislature in deciding what MCA fees would be reasonable. In short, these fees are not taxes and Plaintiffs are therefore not entitled to a refund.

Second, Plaintiffs assert that the challenged fees are facially infirm for their disparate treatment of for-hire motor carriers relative to all other motor carriers that regularly travel Michigan highways. On this view, since the latter group is not subject to the imposition of MCA fees there can be no rational basis for such dissimilar treatment of motor carriers. Saying that "[t]he classification made by the [MCA] is arbitrary and discriminates against for-hire motor carriers," Plaintiffs complain that the MCS denies them equal protection of the law by requiring that only they, and not private or exempt carriers, pay for police enforcement of

safety provisions applicable to the entire trucking industry. Indeed, "There is no difference between for-hire motor carriers, on the one hand, and private and exempt carriers, on the other hand, in terms of the safety concerns that they pose to the traveling public . . . [or] of the amount of police enforcement required to see that they are complying with the law . . . [or] of the amount of damage caused by such carriers to the state and federal highways." Pointing out that the for-hire carriers "have exactly the same interest as private carriers in operating their equipment in a safe fashion," Plaintiffs conclude that imposition of these fees on only the former must be "irrational," "arbitrary" and "discriminatory," and therefore must offend equal protection of the law principles.

This view fails to see, however, that the process of drawing lines and distinguishing between kinds of motor carriers for regulatory purposes is a legislative task of identifying priorities, weighing relevant considerations and choosing among competing alternatives. Equal protection guarantees do not require that such distinctions be ideal: "'[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making necessary classifications is neither possible nor necessary.'" *O'Donnell v. Farm Mutual Automobile Ins. Co.*, 404 Mich. 524, 542; 273 NW2d 829 (1979), app dis 444 U.S. 803 (1980), quoting *Massachusetts Bd. of Retirement v. Mugia*, 427 U.S. 307, 314; 96 S. Ct. 2562; 49 L. Ed.2d 520 (1976), and *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489; 97 S. Ct. 1898; 52 L. Ed.2d 513 (1977).

Nor does equal protection require the legislature to deal with every aspect of the problems presented in motor-carrier regulation at the same time. A statute is not unconstitutional merely because it might have gone further than it did by solving all such problems at once. The legislature need not simultaneously "strike at all evils" associated with such regulatory problems; rather, the measure adopted "'may take

one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'". *Id.* at 543, quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657; 85 S. Ct. 1717; 16 L. Ed.2d 828 (1966), and *New Orleans v. Dukes*, 427 U.S. 297, 305; 96 S. Ct. 2513; 49 L. Ed.2d 511 (1976). All that need be shown is that there was a rational basis for the particular lines that were drawn. If so, the legislative judgment must then be sustained. *Id.* "The mere fact that the Legislature has chosen to draw a distinction" between for-hire and private motor carriers for purposes of this kind of regulation "does jot mean that [the MCA] is unconstitutional." Id. at 547. See also In re Forfeiture of $109,901, 210 Mich. App. 191, 197; 533 NW2d 328 (1995).

Plaintiffs are not members of a protected class and fundamental rights are not implicated in these consolidate actions. This equal protection claim must therefore be assessed by means of a rational basis test. *Saginaw Co., supra* at 222-223. citing *Yaldo v. North Pointe Ins Co.* 457 Mich. 341, 349; 578 NW2d 274 (1998). Michigan courts must uphold the challenged statute where it furthers a legitimate governmental interest and the classification is rationally related to achieving that interest. *Id.* at 223. This requires only that the legislation's distinctions bear a reasonable relationship to a permissible legislative objective. *Pioneer State Mutual Ins. Co. v. Allstate Ins. Co.* 417 Mich. 590, 599-600; 339 NW2d 470 (1983). There need only be some reason for thinking that the means chosen, i.e., the statute's distinctions, are likely to further the legislature's goals. *Doe v. Dep't of Social Services*, 439 Mich. 650, 662; 487 NW2d 116 (1992), citing *Shavers v. Attorney General*, 402 Mich. 554, 613; 267 NW2d 72 (1978), cert den 442 U.S. 934 (1978).

The application and renewal fee and the intrastate and interstate decal fees required by the MCA reflect the legislature's intent to regulate the non-preempted aspects of

the for-hire motor carrier industry remaining after federal preemption of the economic aspects. It surely was not unreasonable for legislators to think that industry in a materially different position relative to the public interest than private carriers. That distinction rationally comports with the legislative intent to subject the former to regulation for the sake of guarding the public. Whether that means to securing the public interest actually works out as intended is another question that is of no concern to equal protection analysis. *O'Donnell, supra* at 549.

Further, the legislature's statutory distinction between commercial and private motor carriers for the purpose of exacting these fees is a valid classification designed to address the specific concerns of this legislation. The objective is without doubt a legitimate state interest, and there is nothing unreasonable or irrational about the classification scheme's relationship to that goal. The fees are not arbitrary since they represent a reasonable effort by government to assure that the public is adequately protected against potential dangers posed by for-hire carriers. Although the lines drawn by the legislature in making the MCA applicable only to commercial carriers may be imperfect, that is not sufficient to render them unconstitutional. "'That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution.'". *Doe, supra* at 681, quoting *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 666-667; 232 NW2d 636 (1975). In short, the challenged fees do not violate equal protection of the law.[4]

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[4] Given the Court's disposition of the first two issues, there is no need to treat Plaintiffs' third issue based on 42 U.S.C. 1983. That is so because § 1983 is merely a vehicle for the vindication of viable claims, and here no such claims remains.

The Court will address next one facet of the federal preemption issue[5] that inadvertently went untreated in the written opinion of October 13, 1998. There, at 11, this Court ruled that the Single State Registration System (SSRS), 49 U.S.C. 11506, now 49 U.S.C. 14504, neither preempted nor prohibited the § 2(2)per vehicle interstate decal fee of $100 imposed by the MCA. The Court reaffirms that ruling and now considers Plaintiffs' contention that, even if that is correct (which they dispute), the same fee had been preempted or prohibited long before Congress adopted the SSRS in 1991 and the Interstate Commerce Commission (ICC) implemented it in 1994. Specifically, they argue that certain pre-SSRS regulations of the IC had imposed an absolute limit, "not to exceed" $5 at one time and $10 later, on all interstate decal fees, including those required by the state that registers and licenses a motor carriers' vehicles. This Court disagrees.

Neither before implementation of the SSRS nor after did the Congress or the ICC impose a ceiling on the fee that a registration state may charge for per-vehicle interstate decals. The fee limits that were imposed applied only to states where the vehicles were not based and registered. The case vaunted by Plaintiffs as providing "an excellent educational discussion of federal law both prior to and after implementation of the SSRS." *Nat' Ass'n of Regulatory Utility Comm'rs* v. *Interstate Commerce Comm.*, 309 U.S. App. D.C. 325; 41 F.3d 721, 724 (1994), says nothing different.[6] Indeed, it does not even touch on the issue but

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[5] For a summary of preemption principles, see *Walker v. Johnson & Johnson Vision Products, Inc.*, 217 Mich. App. 705, 710-713; 552 NW2d 679 (1996).

[6] As to the SSRS, the same case points out at 725 that Congress distinguished the registration state from the participating states:

> The "registration state" may require applicants to submit evidence that they have been certified by the ICC, that they are properly insured, and that they have a local agent available for service of process .... The registration state also collects and distributes per-vehicle fees for those other states participating in the "single-state" system through which the carrier seeks to run its vehicles .... Participation is limited under the statute to the 39 states that had earlier elected to join the "bingo stamp" program .... Each of these states may charge carriers an amount 'equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991,' .... and the registration state must 'issue a receipt ... reflecting that the carrier has filed proof of insurance ... and has paid fee amounts in accordance with the fee system established' .... (Cites deleted.)

The *Nat'l Ass'n* court scrupulously followed this distinction throughout its opinion. This Court has done the same here.

does stress that it was the congressional intent in establishing the SSRS not only "'to benefit the interstate carriers by eliminating unnecessary compliance burdens,'" but also "'to preserve revenues for the states [like Michigan] which had participated in the bingo [card/stamp] program'" of interstate reciprocity under regulation by the ICC. *Id.*, quoting H.R. Conf. Rep. No. 102-404, 102d Cong. 1st Sess. 437 (1991).

In particular, the ICC regulation at issue, 49 C.F.R. 1023.33, remained substantially unchanged from 1982 through 1992 when the agency began its rulemaking implementation of the SSRS. Throughout that period, it is clear that the regulation and its fee limitation applied only to those states requiring "identification stamps" or an identification number for each vehicle not registered or licensed by such states. It did not apply to the state of registration. The § 2(2) per-vehicle interstate decal fee of the MCA is imposed only where Michigan is the state of registration and licensing. It was therefore not preempted or

proscribed by federal law either before or after implementation of the SSRS. In short, Plaintiffs are not due any refund.

Finally, Plaintiffs assert that the Court must grant reconsideration in light of *Yellow Freight*, *supra*, which they say "is dispositive as to certain critical issues in the instant case." It appears, however, that the only issues presented here that *Yellow Freight* disposed of dealt with remedies, whereas Plaintiffs have no remedy in this matter because they cannot prevail on the merits. *Yellow Freight* held that the state had collected SSRS fees pursuant to § 7(4) of the MCA in excess of the amount allowed by the SSRS and that the excess amount had to be refunded. But none of the Plaintiffs in this action, including those named in the Troy Cab complaint, challenges fee collections under § 7(4) on that specific ground. They allege, rather, that such $10 fee assessed against carriers registered and licensed not by Michigan but by the other participating states is somehow "inconsistent" with the SSRS requirements – but without spelling out the precise inconsistency implicated in *Yellow Freight*.[7] It follows that *Yellow Freight* does not govern

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[7] The inconsistency identified in *Yellow Freight*, p. 198, has not been put in contention here:

> "For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as 'bingo stamps,' for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to MCL 478.7(4), MSA 22.565(1)(4), the state had reciprocity agreements with certain other states to that each would waive the fees for vehicles from the other. The dispute a rises in part because *the state changed the method it used for determining reciprocity*. For 1991, the state used the 'base-plating system,' which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit suing the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business." (Emphasis added.)

As a result of this change of method, the plaintiff paid Michigan about $37,800 more under the new system than it had under the old, a "substantial increase in fees" that clearly violated the SSRS. Id. at 198-199.

here. Plaintiffs do not challenge § 7(4) based on any inconsistency with the SSRS stemming from the changed method, implemented by the PSC in 1992, for determining reciprocity among the states.

The Court determines that its order of December 30, 1998 was not erroneously entered. The challenged MCA fees are not unlawful taxes and do not violate equal protection guarantees. Plaintiffs therefore have no remedy, either in the form of refunds or as equitable relief pursuant to § 1983 because, as previously ruled, they cannot prevail on the merits. The Plaintiffs' Motion for Reconsideration must therefore be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's written opinion of October 13, 1998, which is incorporated hereby by reference, is CONFIRMED. The challenged MCA fees were not preempted by federal legislation and regulations. In particular, the § 2(2) per-vehicle interstate decal fee of $100 was not preempted or prohibited by federal law either before or after implementation of the SSRS where the vehicle's "registration state" is Michigan and where the vehicle is operated entirely in interstate commerce by a Michigan-licensed commercial motor carrier. By the same token, the § 2(1) per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic

relevance for interstate traffic. The challenged fees are constitutional and need not be refunded.

IT IS FURTHER ORDERED AND ADJUDGED that this is the final order of the Court and these consolidated cases are hereby DISMISSED.

IT IS SO ORDERED.

[s]
JAMES R. GIDDINGS
Circuit Judge

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellees,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 123566-7
COA: 226052, 226122
Court of Claims: 95-015628-CM

Entered: December 3, 2003

ORDER

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 */s/ Corbin R. Davis*

APPENDIX E

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellees,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 1023562-3
COA: 226052, 226122
Court of Claims: 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, d/b/a S&M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US

TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES, INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 123564-5
COA: 226053, 226137
Court of Claims: 95-015631-CM

Entered: December 3, 2003

ORDER

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 */s/ Corbin R. Davis*